ILE COPY

Supreme Court, U.S.
FILED
SEP 20 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 425

UNITED SHOE MACHINERY CORPORATION,
Petitioner,

vs.

THE HANOVER SHOE, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RALPH M. CARSON
15 Broad Street
New York 5, N. Y.
LEWIS H. VAN DUSEN, JR.
1100 Philadelphia National
Bank Building
Philadelphia 7, Pa.
Attorneys for Petitioner

THEODORE KIENDL
ROBERT D. SALINGER
LOUIS L. STANTON, JR.
Of Counsel

New York, September 16 1960

INDEX

PAGE

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

1. The suit and parties 2
2. Pleadings 3
3. Order for preliminary trial 3
4. Trial and salient proof thereon 4
5. Decision and allowance of appeal to the Court of Appeals for the Third Circuit 5
6. Decision of the Court of Appeals adopting decision of the District Court 5
7. Essence of opinions below 5

REASONS FOR GRANTING THE WRIT 6

POINT I—THE COURTS BELOW HAVE RENDERED A DECISION IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER 7

1. Contrary decisions of Courts of Appeals of the Seventh, Eighth and Ninth Circuits 7

(a) Twin Ports Oil Co. v. Pure Oil Co., 119 F. 2d 747, cert. denied 314 US 644 7

(b) Leonard v. Socony-Vacuum Oil Co., 42 F. Supp. 369, appeal dismissed 130 F. 2d 535 8

(c) Northwestern Oil Co. v. Socony-Vacuum Oil Co., 138 F. 2d 967, cert. denied 321 US 792 8

PAGE

(d) Clark Oil Co. v. Phillips Petroleum Co., 56 F. Supp. 569, aff'd 148 F. 2d 580, cert. denied 326 US 734 9

(e) Wolfe v. National Lead Co., 225 F. 2d 427, cert. denied 350 US 915 9

2. Contentions in unsuccessful petitions for writs of certiorari 10

(a) Twin Ports 10

(b) Northwestern Oil 11

(c) Clark 11

(d) Wolfe 12

3. Other cases in accord 13

4. The decision below is in irreconcilable conflict with the above-described decisions 13

POINT II—THE COURT BELOW HAS INCORRECTLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT 14

1. Meaning of statutory language 15

2. The tort damage analysis of the opinions below is inapplicable 16

3. Gross injustice will result from the decision below 19

CONCLUSION 22

TABLE OF CASES

PAGE

Adams v. *Mills* 286 US 397 11

Anniston Mfg. Co. v. *Davis* 301 US 337 21

Banana Distributors v. *United Fruit Company*, 162 F. Supp. 32 13

Basic City, Town of v. *Bell* 114 Va. 157, 76 SE 336 17

Chattanooga Foundry & Pipe Works v. *City of Atlanta* 203 US 390 ..... 11, 19

Clark Oil Co. v. *Phillips Petroleum Co.* 56 F. Supp. 569, aff'd 148 F. 2d 580, *cert. denied* 326 US 734 ..... 9, 11-3

Icletts v. *St. Paul M. & M. Ry. Co.* 30 Minn. 265, 15 NW 237 18

Joliet, City of v. *Blower* 155 Ill. 414, 40 NE 619 17

Keogh v. *Chicago & Northwestern R. Co.* 260 US 156 17

Leonard v. *Socony-Vacuum Oil Co.* 42 F. Supp. 369, appeal dismissed 130 F. 2d 535 ..... 8, 13

Massachusetts v. *United States* 333 US 611 14

McInroy v. *Dyer*, 47 Pa. 118 18

H. E. Miller Oil Co. v. *Socony-Vacuum Oil Co.* 37 F. Supp. 831 13

Miller Motors, Inc. v. *Ford Motor Co.* 252 F. 2d 441 ..... 6, 13

N. Y. N. H. & H. R. Co. v. *Ballou & Wright Co.* 242 Fed. 862 11

Northwestern Oil Co. v. *Socony-Vacuum Oil Co., Inc.* 138 F. 2d 967, *cert. denied* 321 US 792 ..... 8, 11, 13

O'Brien v. *McCann* 58 NY 373 18

Southern Pacific Co. v. *Darnell-Taenzer Lumber Co.* 13 ICC 668, 221 Fed. 890, 245 US 531 11

Straus v. *Victor Talking Machine Co.* 297 Fed. 791 11

PAGE

Twin Ports Oil Co. v. *Pure Oil Co.* 119 F. 2d 747, *cert. denied* 314 US 644, rehearing denied 314 US 711 ..... 7-8, 10, 13

United Shoe Machinery Corp. v. *United States* 258 US 451 20

United States v. *Aluminum Co. of America* 148 F. 2d 416 20

United States v. *Title Insurance & Trust Company* 265 US 472 14

United States v. *United Shoe Machinery Company of N. J.* 247 US 32 20

United States v. *United Shoe Machinery Corporation* 110 F. Supp. 295, aff'd 347 US 521 ..... 3, 16, 20

United States v. *Winslow* 227 US 202 20

Wolfe v. *National Lead Co* 225 F. 2d 427; *cert. denied* 350 US 915 ..... 9-10, 12-3

Woods v. *Interstate Realty Co.* 337 US 535 14

STATUTES AND OTHER AUTHORITIES

PAGE

Annual Report of Proceedings of the Judicial Conference
1958—pp. 92, 94 21
1959—p. 110 21

Clayton Act § 4, 38 Stat. 731, 15 USC § 15 ..... 1-2, 14-5, 20,22

21 Congressional Record 90 15

Federal Rules of Civil Procedure
Rule 42(b) 1, 4

26 Fordham L. Rev. 380 18

Interlocutory Appeals Act, 28 USC § 1292(b) 5

Judicial Code, 28 USC § 1254 subd. 1, 62 Stat. 928 ... 2

4 Restatement, Torts, § 910 comment b 17

Senate Bill S. 1, § 2 (51st Cong. 1st Sess.) 15

Sherman Act
§ 2, 26 Stat. 209, 15 USC § 2 ..... 2, 3
§ 7, 26 Stat. 210, 15 USC § 7 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

UNITED SHOE MACHINERY CORPORATION, *Petitioner,* *vs.* THE HANOVER SHOE, INC., *Respondent.*	No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

United Shoe Machinery Corporation (herein called "United") prays for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered June 30 1960 (p. 26 below), together with the underlying memorandum decision of that Court dated June 30 (p. 24 below) affirming the order of the District Court on the opinion of that court. After trial of a preliminary issue under Rule 42(b), these held that monopolistic over-charges, even though passed on by plaintiff to its customers, constitute an injury to plaintiff's business or property within the meaning of Clayton Act § 4.

Opinions Below

The District Court's opinion dated February 12 1960 and orders dated February 12 and 17 1960 appear in the separate appendix herein (App. 191a-202a). The opinion of the Court of Appeals, rendered June 30 1960, and its order dated June 30 1960 are attached to this brief (pp. 24-6 below). Neither opinion has been officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered June 30 1960. The jurisdiction of this Court is invoked under 28 USC § 1254 subd. 1, 62 Stat. 928.

Questions Presented

1. In a private antitrust case for treble damages brought under Clayton Act § 4 by a plaintiff engaged in the business of manufacturing and distributing shoes and utilizing in his business defendant's shoe machinery under lease, must plaintiff prove that (assumed) excessive lease charges for the shoe machinery were absorbed by it, and not included in its retail price for shoes which its customers paid?

2. Can a plaintiff manufacturer who includes in his sale prices alleged excessive shoe machinery charges and recovers them from his customers properly claim that he has been "injured in his business or property" within the meaning of Clayton Act § 4 and again recover them from defendant lessor as "damages by him sustained"?

Statute Involved

The relevant provision of Clayton Act § 4 (38 Stat. 731; 15 USC § 15) is reprinted at the end of this petition (p. 23 below).

Statement of the Case

1. *The suit and parties.* This is a private antitrust action pursuant to Sherman Act § 2 (26 Stat. 209; 15 U. S. C. § 2) and Clayton Act § 4 (38 Stat. 731; 15 U. S. C.

§ 15) by a Pennsylvania corporation (hereinafter referred to as "Hanover") against United. Both parties do business in the Middle District of Pennsylvania, where the action was filed in September 1955.

Hanover has been engaged in the manufacture and sale of shoes since 1901 and has for many years leased from defendant shoe machinery for the production of shoes which plaintiff sells. United is the leading shoe machinery maker of the United States active in research for and invention and improvement in the machinery needed by the shoe trade (110 F. Supp. at 339-40). By means in part of this leasing system defendant in 1953 was supplying over 75% and probably 85% of the demand in the American shoe machinery market (110 F. Supp. at 339). By reason of having so maintained this position which was lawfully accomplished in the first instance (110 F. Supp. at 307), defendant in 1953 was held to have monopolized the shoe machinery trade contrary to Sherman Act § 2. *United States* v. *United Shoe Machinery Corporation*, 110 F. Supp. 295 (D. Mass. 1953) aff'd. 347 U.S. 521 (1954).

2. *Pleadings.* The complaint charges a monopoly by defendant and damage to plaintiff through excessive rental and royalty charges in an aggregate amount of $1,750,000 (as amended Nov. 20 1956), intended to be trebled to $5,250,000. Plaintiff expressly states that it seeks the return of such excess, and not "loss of profits" (Plaintiff's Proposed Conclusion of Law No. 9 App. 189a).

The answer, while admitting the leasing of various machines to plaintiff and admitting certain leasing practices, constitutes for the rest a general denial, with certain affirmative defenses.

3. *Order for preliminary trial.* In view of the presence under the statute of the initial question (irrespective of any other issue) whether plaintiff sustained any injury, the

parties stipulated certain facts and assumptions relevant to that single issue under date of March 22 1957. On April 1 1957 a consent order pursuant to Rule 42 (b) was made by Hon. John W. Murphy, Chief Judge of the Middle District, for a separate trial to determine whether the case could be adjudicated upon this point. This order provided in part:

> "ORDERED that there be tried as a separate issue in advance of trial of the other issues in this action the issue as to whether the excessive shoe machinery costs alleged by plaintiff and denied by defendant constituted an injury to plaintiff's business or property in that:
>
> (a) plaintiff contends that (1) all said excess machinery costs were borne by it because as a matter of law it suffered injury at the moment it paid said excess costs and (2) the facts will demonstrate that said excess costs were absorbed by it and were not reflected in adjustments of the price of shoes made with said machinery; and
>
> (b) defendant contends that all alleged excess costs have been passed on by plaintiff to others and thus have not been borne by plaintiff . . ." (App. 25a)

4. *Trial and salient proof thereon.* Trial of the "passing-on" issue was held before Judge Murphy without a jury on separate dates in April and May and concluded June 28 1957. The trial established in substance that plaintiff had an exceptionally profitable operation as compared with other shoe manufacturers in the United States; and that specific provision was made in plaintiff's accounting procedure for including in the wholesale and retail prices of its shoes the entire cost of shoe machinery which was therefore paid by plaintiff's customers (App. 87a, 88a, 93a, 94a, 102a-104a, 111a, 148a).

5. *Decision and allowance of appeal to the Court of Appeals for the Third Circuit.* On November 25 1959 Chief Judge John Biggs, Jr. designated Hon. Herbert F. Goodrich, United States Circuit Judge, to hold the District Court of the United States in and for the Middle District of Pennsylvania in connection with this case, finding that the public interest so required (App. 190a). On February 12 1960 Judge Goodrich filed his decision declaring that plaintiff need not sue for loss of profits, but could recover excess charges without proving they were ultimately sustained by it. This made it unnecessary "to go into the evidence concerning the factual accuracy of the ['passing on'] argument." Judge Goodrich stated that the case involved a controlling question of law as to which there is substantial ground for difference of opinion, and certified it for appeal under 28 U. S. C. § 1292(b) which was on March 7 1960 granted by the Court of Appeals for the Third Circuit (App. 203a).

6. *Decision of the Court of Appeals adopting decision of the District Court.* On June 30 1960 the Court of Appeals in a memorandum opinion *per curiam* affirmed the order of the District Court on the opinion of that court (p. 24 below).

7. *Essence of Opinions Below.* Judge Goodrich's opinion, adopted by the Court of Appeals, may be summarized as follows:

(a) He did not feel it necessary to go into the facts concerning plaintiff's business and its method of recovering from the public all costs because of his views on the law.

(b) On the hypothesis recited in the order for separate trial, that monopolization and excessive charges (al-

though denied) are assumed, a cause of action is at once created for the amount of the excess, and payment thereof by the consumer is irrelevant. The excessive price is held to be the injury upon its first impact and regardless who really paid it.

(c) Defendant is not relieved of liability because plaintiff passed on the lease charges to its customers. As a pure matter of tort law, the victim of a tort has his cause of action "at the moment that the tort occurs" (App. 194a-195a), and things which happen later and mitigate the loss do not inure to the benefit of the defendant (App. 195a).

(d) The decisions of the Supreme Court in Interstate Commerce Act cases were treated as analogous by Judge Goodrich, and the contrary decisions in Clayton Act cases concerning the passing-on issue in the Seventh, Eighth and Ninth Circuits were in part distinguished and in part held to be bad law. The dictum of Judge Sobeloff in the *Miller Motors* case, 252 F. 2d 441, 448 (4th Cir. 1958) was also regarded by Judge Goodrich as not a correct statement of the law. The ground for distinction of certain of the authorities in defendant's favor was said by Judge Goodrich to be that in those cases the plaintiffs were middlemen who resold the product, whereas in the instant case plaintiff is a consumer of the product.

Reasons For Granting the Writ

1. The courts below have made a momentous innovation in holding that plaintiff need not prove that it *absorbed* monopolistic over-charges and as a result sustained pecuniary loss. In this they contravened the law laid down for private antitrust suits by three Federal Courts of Appeal, with respect to which this Court denied certiorari.

2. The courts below have warped the governing statute in by-passing the requirement that a plaintiff show he was "*injured in his business or property*", and the explicit limitation upon recovery to "threefold the damages *by him sustained.*" This is a departure of great importance in the antitrust field in which advancing interpretations of the statutes create violations where none existed before and expose business men who believed themselves law-abiding to unforeseen claims for damages.

POINT I

THE COURTS BELOW HAVE RENDERED A DECISION IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER.

1. *Contrary decisions of Courts of Appeals of the Seventh, Eighth and Ninth Circuits.*

(a) *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. 2d 747 (8th Cir.), *cert. denied*, 314 U S 644 (1941)

Plaintiff oil jobber sought treble damages for losses alleged to be due to a violation of the Sherman Act by defendant and other major oil companies. Plaintiff showed that the cost to it of gasoline had been maintained by the unlawful combination at 2¼¢ per gallon above what it would have been if the combination had not existed. However, plaintiff failed to prove its profit margin had been reduced. Indeed, the evidence indicated that its profit margin had been maintained through a contract provision with the defendant. *Held* that this increase of 2¼¢ per gallon

> "could in any event result in no damage to appellant, absent proof that its selling price was not correspondingly increased, and particularly since its contract with appellee protected the stability of its margins." 119 F. 2d at 750

(b) *Leonard* v. *Socony-Vacuum Oil Co.*, 42 F. Supp. 369 (Wis.), *appeal dismissed*, 130 F. 2d 535 (7th Cir. 1942)

Plaintiff gasoline jobber sued defendants who had been previously convicted of the same conspiracy involved in the *Twin Ports* case, alleging that it had been charged excessive amounts for gasoline which it resold to its customers. The court granted summary judgment, stating in part (42 F. Supp. at 370):

> "The decision in the Twin Ports case is binding on this Court. If the question were before me as an original proposition, I would reach the same conclusions as did the Circuit Court of Appeals for the Eighth Circuit. . . .
>
> ". . . The jobber's situation and right to recover from defendants herein is dependent upon both his buying and selling prices, and allegations in the complaint concerning only one of such prices is of no significance in determining the question of injury to the jobber's business or property. The burden is on the jobber to allege and prove the facts with respect to his selling price as well as his buying price."

(c) *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F. 2d 967 (7th Cir. 1943), *cert. denied*, 321 U. S. 792 (1944)

The same type of plaintiff and the same factual situation was involved in this case as was involved in the *Twin Ports* and *Leonard* cases. The Court of Appeals for the Seventh Circuit in sustaining dismissal said (138 F. 2d at 971):

> "In other words the Clayton Act does not permit recovery by plaintiff in causes such as this for unlawful prices as such but authorizes recovery only of pecuniary loss to property or business. . . . Inasmuch as plaintiff has wholly failed to prove any loss

to its property or business but rather has shown by all reasonable inferences, that the increased cost of which it complained was passed on to the ultimate consumer, the court rightfully directed a verdict for defendant."

(d) *Clark Oil Co. v. Phillips Petroleum Co.*, 56 F. Supp. 569 (D. Minn. 1944), *aff'd*, 148 F. 2d 580 (8th Cir.), *cert. denied*, 326 US 734 (1945)

Plaintiff oil jobber sued the same defendants involved in the above-described cases, alleging an overcharge of 2¼¢ per gallon of gasoline. He claimed damage on the "illegal exaction theory," and did not claim that his profit margins had been reduced. In granting defendants summary judgment, the District Court said (56 F. Supp. at 574):

> "It seems clear, therefore, that the increase in price is not, in and of itself, the yardstick of damage. . . . Moreover, the attempted characterization of the theory of damages in the instant case as one of 'illegal exaction' cannot change the basic and fundamental principle of damages in anti-trust cases, which is pecuniary loss. It is elementary that there may be illegal exaction without pecuniary loss."

In affirming, the Eighth Circuit Court of Appeals stated (148 F. 2d at 582):

> "Plaintiffs are seeking, not compensation for damages suffered by defendants' illegal acts, but profits because of said act.
>
> . . . . .
>
> Plaintiffs' right to recover from defendants is dependent upon both the buying and selling prices."

(e) *Wolfe v. National Lead Co.*, 225 F. 2d 427 (9th Cir.), *cert. denied*, 350 US 915 (1955)

The plaintiffs, paint manufacturers, sued National Lead Company and E. I. du Pont de Nemours and Company,

Inc. who supplied titanium, an important ingredient of paint. Plaintiffs charged defendant with restricting their supply of titanium pigment and with fixing its price, so that plaintiffs had to pay an excessive rate through purchase of a more expensive substitute. The Court of Appeals for the Ninth Circuit held on alternative grounds that there was no evidence that plaintiffs had been damaged. With respect to the passing-on issue, the court stated in part (225 F. 2d at 433):

> "If appellants did not absorb such increase in price but passed it on to their customers, they could not recover in a treble damage action brought under the antitrust act. . . .
>
> An examination of the contentions advanced by appellants that they could not have passed on the increased costs to their customers is unconvincing."

2. Contentions in unsuccessful petitions for writs of certiorari.

In four of the five above-described cases the unsuccessful plaintiff petitioned this Court for a writ of certiorari. We here set forth some of the contentions in those petitions and briefs in order to emphasize that the decision below stands alone and is clearly contrary to the uniform rule heretofore followed in applying the Clayton Act.

(a) Twin Ports

In their petition filed July 1 1941 petitioners contended (p. 7):

> "7. That the case was tried under the illegal exaction rule enunciated in *Chattanooga Foundry Co.* v. *City of Atlanta*, 203 U. S. 390, 51 L. Ed. 241, 27 S. Ct. 65; *Thomsen* v. *Cayser*, 243 U. S. 66, 61 L. Ed. 597, 37 S. Ct. 353, and *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791. That the defense was that the illegal exaction was passed on

> to the retailer" (254) a defence not allowable under *Southern Pacific* v. *Darnell*, 245 U. S. 531, 62 L. Ed. 451, 38 S. Ct. 186, and *Adams* v. *Mills*, 286 U. S. 397, 76 L. Ed. 1184, 52 S. Ct. 589, and that the opinion of the Circuit Court runs counter to all of the cases set forth in this paragraph."

Petitioners elaborated on their contentions and argued *Southern Pacific* v. *Darnell-Taenzer* and *Adams* v. *Mills* at length. These were cases relied on by Goodrich J. in the instant case (App. 196a).

Certiorari was denied in 314 U. S. 644 (1941).

(b) Northwestern Oil

In their petition filed February 24 1944 plaintiffs stated that the Circuit Court of Appeals erred (pp. 8-9):

> "1. In sustaining the ruling of the trial court the Petitioner could not recover any part of the illegal excess cost of gasoline exacted through a conspiracy in violation of the Antitrust Act, unless it first proved that such excess was not recovered by it in subsequent sales thereof."

and argued from *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*; *Adams* v. *Mills*, *Chattanooga Foundry & Pipe Works* v. *City of Atlanta* and *N. Y. N. H. & H. R. Co.* v. *Ballou & Wright Co.*, which the Seventh Circuit Court of Appeals had held to be inapplicable. Petitioner also claimed a conflict with *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791 (2d Cir. 1924) (pet. 23-7).

Certiorari was denied in 321 U. S. 792 (1944).

(c) Clark

In its petition filed July 10 1945 plaintiff pointed out that the courts below had directed summary judgment for defendants on evidence that there had been a 2¼¢ illegal

exaction for material which had been resold in the ordinary course of business. Petitioners argued that they did not have to prove a loss of profits and that "illegal exaction" was enough.

Certiorari was denied in 326 U. S. 734 (1945).

(d) Wolfe

In their petition filed October 20 1955 plaintiffs argued (pp. 15-6):

> "3. This Court has never settled the so-called 'passing-off' doctrine. The use of the 'passing-off' doctrine to this case exhibits a tendency not to award damages where a wrong has been done. It has never, until now, been applied to a situation where a conspiracy forces the use of a substitute. There is no precedent for it. It is elementary damage law that the increased cost of a substitute material is a recoverable damage. (McCormack, Damages, § 42, Sedgwick, Damages, § 2269.)
>
> . . . This is the first known time that the doctrine has been applied to a manufacturer who does not resell the very same article. The application of 'passing-off' doctrine to the instant case is, in fact, in probable conflict with the decision of this Court in *City of Atlanta* v. *Chattanooga Foundry and Pipe-works*, 203 U. S. 390, where the Court held that the mere purchase of a price fixed commodity at increased prices caused the purchaser injury. At 203 U. S. 396, Justice Holmes stated:
>
> > 'It was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property. * * *'

In this regard the decision of the Ninth Circuit is in conflict with the case of *Thomsen* v. *Union Castle Mail Co.* (2d Cir. 1908), 166 Fed. 251; which held—if party is coerced into paying sums of money

"in excess of reasonable rates, he is damaged within the meaning of the antitrust laws to the extent of the sum so paid. Clearly the use of the 'passing-off' doctrine, heretofore thought dead and buried, see Comment 18 Univ. of Chicago Law Rev. 130, 61 Yale Law Rev. 1010, at 1023, is an important development in the private antitrust field and ought to be settled by the Court."

Certiorari was denied in 350 U. S. 915 (1955).

3. Other cases in accord.

The rule expressed in the foregoing cases, that transfer to others of an asserted over-charge negatives injury, has been accepted in dicta elsewhere.

Miller Motors v. *Ford Motor Company*, 252 F. 2d 441, 448 (4th Cir. 1958);

Banana Distributors v. *United Fruit Company*, 162 F. Supp. 32, 47 (S. D. N. Y. 1958);

H. E. Miller Oil Co. v. *Socony-Vacuum Oil Co.*, 37 F. Supp. 831 (E. D. Mo. 1941).

4. The decision below is in irreconcilable conflict with the above-described decisions.

The opinion below distinguished the Court of Appeals cases described above on the grounds that *Wolfe* was dictum (App. 198a) and that *Twin Ports*, *Leonard*, *Northwestern Oil* and *Clark* "involved middlemen who were selling a product supplied for resale by a Sherman Act violator whereas plaintiff here is simply a lessee of equipment which sells its own product" (App. 197a).

But these are not legally significant distinctions. As can be immediately seen from the description of the *Wolfe* case (p. 12 above), the court's decision dealing with the passing-on issue was an alternative holding, not a dictum.

See *United States* v. *Title Insurance & Trust Company*, 265 US 472, 486; *Massachusetts* v. *United States*, 333 US 611, 623; and *Woods* v. *Interstate Realty Co.*, 337 US 535, 537. And the rationale of the oil jobber cases involving middlemen was that, while the Sherman Act violator had imposed monopolistic *over-charges* on the respective plaintiffs, these *over-charges* had not been absorbed by the plaintiffs. This rationale is not concerned with the nature of the product sold, whether it is re-sold, whether it is consumed or transformed into another product. The sole question was whether the plaintiffs had been "injured" by an illegal exaction. The determination that the illegal exaction had been passed on to others was held to negative injury. If an illegal exaction is passed on without a loss of profits to the plaintiff, the plaintiff, whether middleman or manufacturer, is a conduit only and not a sufferer.

Each of the cases on which we rely negatives and rejects the theory accepted below that payment of the illegal exaction is injury *co instanti* without more.

It needs no argument that the rationale of the decisions relied upon by us is contradictory of the rationale followed below, and that confusion will necessarily result in the administration of this field of law enforcement (see p. 21 below) unless and until this Court assumes jurisdiction by the writ of certiorari.

POINT II

THE COURT BELOW HAS INCORRECTLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Treble damage actions under Clayton Act § 4 constitute an increasingly frequent type of action brought under the antitrust laws. The decisions below are the first under the antitrust laws which sustain a theory of injury as of the moment of the alleged over-charge regardless of the real economic effect. By their novelty and inconsistency with

the cases cited they unsettle the law heretofore believed to be controlling in this field, particularly by reason of the fact that review of the decisions cited has not been undertaken by this Court. Further the decisions below introduce injustice by way of multiple recovery and otherwise.

1. Meaning of statutory language.

Our argument is rooted in the statute which grants the action only to a "person who shall be *injured in his business or property*" for "threefold the damages *by him* sustained".

In the application of this statute by the courts, we submit it is error to depart from the requirement so made of an over-all loss to the plaintiff, by substituting therefor incorrectly applied common law considerations of tort damage. The legislative history does not warrant such treatment. Sherman Act § 7, which is the origin of Clayton Act § 4, was expressed in Senator Sherman's original draft as granting a private right of action to "any person or corporation injured or damnified" for the recovery of "twice the amount of damages sustained and the costs . . ." (51st Cong. 1st Sess. March 18 1890; 21 Cong. Rec. 90).

Before the Committee on the Judiciary reported out the bill it inserted "by him" into the clause, so that the law was enacted with the limitation to ". . . threefold the damages *by him* sustained . . ."

Had Congress intended the Clayton Act to operate the way Hanover asks and the courts below have held, it would have used other language. The original language of Senator Sherman's bill, not enacted, provided that any person injured could sue for

> " . . . the *full consideration or sum paid* by him for any goods . . . included in or advanced in price . . ." (§ 2, Senate Bill S. 1, 51st Cong. 1st Sess., introduced December 4 1889. Italics supplied)

2. The tort damage analysis of the opinions below is inapplicable.

The opinion of the District Court adopted by the Court of Appeals rejects the proposition that the plaintiff must show an actual pecuniary injury. The opinion below states that "plaintiff's injury occurred when it was charged too much for the machinery.". The court reasoned (App. 194a):

> "If it had not thus been illegally charged for machinery it would have had more money to pay out in dividends, or to engage in a further development campaign to sell its shoes, or to raise the wages of its employees, or to enlarge its bank account as protection against a rainy day, or for all of these things."

This language, directly related to the holding that the overcharge constituted immediate injury, rests on sheer speculation and surmise. No one can say that plaintiff would have had "more money" for the purposes indicated. It would certainly not if it had reduced its selling prices commensurately with the saving in the alleged over-charge.

Now the strongly competitive state of the shoe industry makes such a reduction of plaintiff's selling prices inevitable in the circumstances. The intense competition in the industry is perfectly clear in the testimony (App. 74a-75a, 60a, 55a-57a, etc.). The rates charged by petitioner for all its customers were uniform, as found by Judge Wyzanski in the Government case; 110 F. Supp. 295, 340, aff'd *per curiam* 347 U. S. 521. Hence the pressure of rivalry with other shoe manufacturers must have converted Hanover's economies in machinery charges into price reductions or quality improvements in order to keep pace with its rivals, *because they would have enjoyed the same economies.* The non-existence of antitrust injury under these circumstances

was held for a unanimous court by Brandeis, J. in the classic opinion of *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 165.

The District Court's opinion goes on to say that a person "against whom a tort is committed has his cause of action at the moment that the tort occurs" (App. 194a-195a). This is certainly true if there has been a tort and if plaintiff has damage therefrom. Since the case at bar does not involve a technical tort such as assault or battery giving rise to a cause of action with nominal damages only, there is in the instant case no tort *ab initio* if there is no damage. Similarly, if there were damage but if an event prior to trial

> "... *prevents or diminishes harmful consequences of the tortious conduct or which indicates that the conduct is less harmful than had been supposed, prevents or diminishes damages for such consequences.* Thus where a person or his horse has been tortiously hurt, if the trial were had at once, the amount of damages would depend upon the length of time during which he or his animal would probably be disabled and other similar factors. If, however, the trial takes place two years later, some of the events forecast previously may not have occurred, while others, perhaps less likely, may have taken place. Thus, if in the meantime, an injured person has become completely well, the damages will include only the elements of loss during the preceding period." 4 Restatement, Torts § 910 comment b. (Italics supplied)

The principle has been illustrated in a number of cases. Where a town deprives an owner of one access to his property it may show the opening to him of a better one after he brought his action, for the evidence is not in mitigation of damages but in proof of what he actually suffered. *Town of Basic City* v. *Bell* 114 Va. 157, 76 SE 336 (1912); *City of Joliet* v. *Blower* 155 Ill. 414, 40 NE 619 (1895). A carrier who has misdelivered goods may show that the owner has

been compensated by the recipient. *Jelletts* v. *St. Paul M. & M. Ry. Co.* 30 Minn. 265, 15 NW 237 (1883). The same rule applies where it is through plaintiff's own efforts that his damages were reduced. See *O'Brien* v. *McCann*, 58 NY 373 (1874); *McIlroy* v. *Dyer* 47 Pa. 118 (1864).

In a Clayton Act case, in order for there to be a tort there must be damage. The tort argument of the courts below is based upon examples which are not analogous; they are examples within the so-called collateral source doctrine, which is not applicable here as a matter of the general common law of damages. The examples cited by the Court from the authorities involve unrelated subsequent events: reimbursement through an insurance policy, gratuities of friends, and wages continued by an employer (App. 195a). One authority cited by the Court, 26 Fordham L. Rev. 380, 381-82 (App. 195a, footnote 5) shows by its exposition of the collateral source doctrine that it cannot be applicable to the case at bar. The underlying rationale is that a tortfeasor is not justified in deducting from his liability benefits which plaintiff receives from a source *unrelated to the cause of action*. Thus in insurance, pension or like situations, the rule is based upon the theory that the sums which plaintiff has paid for the insurance, pension or the like are in the nature of an investment which, like other investments of plaintiff, ought not to inure to the benefit of the wrongdoer. 26 Fordham L. Rev. at 381-2. Similarly, wages or salary continued gratuitously by an employer should not inure to the wrongdoer's advantage because the employer acted as donor without any purpose of aiding the tortfeasor; those continued through contract are deemed compensation for past services; and all payments of this kind are unrelated to the cause of action asserted.

The contrary is the case with a statutory grant of a right of action to the person injured by antitrust violation. The receipts of the plaintiff from the "property or business"

deemed to be injured are directly related to the questioned act or conduct claimed to diminish those receipts. The concept necessarily involved in any test of injury is well expressed in the phrase "total wealth" which Holmes, J. used in appraising a Clayton Act suit for purposes of the Tennessee statute of limitations. *Chattanooga Foundry* v. *Atlanta*, 203 US 390 398-9.

Here Hanover's increased sale prices for shoes are not a receipt of benefits from unrelated third persons either gratuitously or as a result of prior investments—in other words are not a "collateral source"—but a benefit or economic advantage directly connected with the alleged excessive lease charges for shoe machinery. The injury to Hanover's business or property must be measured by income as against outgo, and the theory of automatic harm at the impact of excessive rental payments and without consideration of receipts from the use of the machines rented is meaningless in the context of the Clayton Act.

3. Gross injustice will result from the decision below

If the decision below stands every person through whom a so-called "illegal exaction" flows will have a cause of action against the party imposing that exaction. Since each party who acted as a conduit may receive treble the amount exacted, even though the exaction had caused no actual injury to that party, defendant may be liable for three, six, nine or more times the amount exacted. The amount which could be recovered from defendant would depend upon the number of persons through whom the exaction flowed. This number could vary widely; and, indeed, persons might collusively make additional sales in order to create causes of action against defendant.

Such shocking consequences cannot have been intended by Congress. It is no answer, we submit, to say as does

the Court of Appeals (p. 25 below) that any modification of Clayton Act § 4 to avert a windfall "would be for the Congress", because the question is whether Congress can in the first instance have been deemed to intend a construction so unfair in its potentiality and so insensitive to the real economic character of a "property or business".

In the case at bar, the rule announced below threatens to wreak particular injustice, because the petitioner had good reason to think itself in full conformity with the anti-trust law until Judge Wyzanski's decision of February 1953. Such belief on its part rested on decisions of this Court in the three cases of *United States* v. *Winslow*, 227 US 202, *United States* v. *United Shoe Machinery Company of N. J.*, 247 US 32, and *United Shoe Machinery Corp.* v. *United States*, 258 US 451. As Judge Wyzanski said, 110 F. Supp. at 348,

> "What United is now doing is similar to what it was then doing, but the activities which were similar stood uncondemned,—indeed, one ought to go further and say they were in part endorsed."

The decision against petitioner on which the instant case rests was believed by Judge Wyzanski to stem from the *Alcoa* case (1945); so that the decree against petitioner which Hanover would take as *prima facie* evidence of anti-trust violation represented a change in the law and a finding of violation where none had existed before. To a defendant so circumstanced, application of the illegal exaction theory without regard to the ultimate economic consequence of the machinery charges complained of, comes with peculiar unfairness.

In view of the prior endorsements by this Court of the very practices alleged to be violations of the Sherman Act, the Government in good conscience could not have brought a criminal action in 1953 calling for punitive treatment of defendant by way of fine or imprisonment. Yet, if Hanover

passed the alleged over-charges on to its customers so that it suffered no actual pecuniary loss or injury, any recovery of treble damages from defendant would be in no way compensatory, but purely and unfairly punitive. Such recovery would not only constitute a complete windfall to Hanover, but would be payable to a party who actually benefited from the alleged over-charges, since its profits were based upon a percentage of its costs, including the very over-charges of which it now complains. A statute should not be construed so as to promote this type of windfall. Cf. *Aniniston Mfg. Co.* v. *Davis* 301 US 337.

The burden of private antitrust suits on crowded dockets adds urgency, we submit, to the question here tendered. In the fiscal year 1960 a total of 230 cases were commenced, according to information received by us from the Administrative Office of the United States Courts by letter dated September 6 1960. In the year 1959 the cases commenced numbered 250 (Annual Report of Director of Administrative Office at p. 110 of Annual Report of Proceedings of the Judical Conference for 1959), and in the year 1958 they had increased to 270 or 44% from the prior year (Annual Report of the Director of Administrative Office at p. 92 of Annual Report of Proceedings of the Judicial Conference for 1958). In his Report for 1958 the Director underscores the significance of this type of case with the comment (p. 94):

> "Though the volume of these cases is not large, the increase is highly significant from the standpoint of judicial administration because private antitrust actions are frequently time consuming to the courts and are generally filed in metropolitan areas where dockets have been badly in arrears."

The ruling herein sought to be reviewed would throw back to the District Court the complex problem of assessing the value of hundreds of ten-year leases of shoe machinery in the period 1939-55 under hypothetical conditions of competition. The correct principle, as illustrated in the decisions of the Seventh, Eighth and Ninth Circuit Courts of Appeals above cited, makes this quite unnecessary.

CONCLUSION

The opinions below have misapplied the common law of damages and reached a result contrary to the decisions in other circuits interpreting an important Act of Congress. The decision below is contrary to the plain meaning of Clayton Act § 4, and would result in gross injustice if allowed to stand. The novelty and importance of the question warrant review by this Court by writ of certiorari.

Respectfully submitted,

RALPH M. CARSON
LEWIS H. VAN DUSEN, JR.
Attorneys for Petitioner

THEODORE KIENDL
ROBERT D. SALINGER
LOUIS L. STANTON, JR.
Of Counsel

New York, September 16, 1960

CLAYTON ACT § 4, 38 Stat. 731, 51 USC § 15

"§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,198

THE HANOVER SHOE, INC.,
Appellee,

v.

UNITED SHOE MACHINERY CORPORATION,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued June 23, 1960

Before McLAUGHLIN, STALEY and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed June 30, 1960)

PER CURIAM.

In this suit brought under Section 4 of the Clayton Act, 15 U. S. C. A. § 15, for alleged injury resulting from claimed violation of Section 2 of the Sherman Act, 15 U. S. C. A. § 2, by defendant there was before the district court for trial as a separate issue the question of "Whether the excessive shoe machinery costs alleged by the plaintiff and denied by the defendant constituted an injury to plaintiff's business or property." The quoted from consented to order further provided that the determination of the separate issue would proceed on the assumption "that the violation of the law as alleged existed, and (2) that the excessive cost of machinery

as alleged existed." The sole defense to that assumed state of facts was that plaintiff passed along defendant's excessive charges to its customers and therefore was not injured.

The district court in a thoroughly convincing opinion rejected the proposition advanced by defendant as contrary to the language and purpose of the governing law. Appellant also asserts that the trebled damages called for by Section 4 would result in a windfall to plaintiff. Congress, in line with its effort to eliminate the sort of monopolistic practice here revealed imposed this rigorous penalty. The assumed situation before the district court is scarcely to be called sui generis but if by any chance it should be so categoried then any modification of Section 4 to fit the particular circumstances would be for the Congress.

The order of the district court will be affirmed on the opinion of that court.—F. Supp.—(D. C. M. D. Pa. 1960).

A True Copy:

Teste:

IDA O. CRESKOFF
Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,198

THE HANOVER SHOE, INC.,

Appellee,

v.

UNITED SHOE MACHINERY CORPORATION,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: MC LAUGHLIN, STALEY AND HASTIE,

Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF
Clerk

June 30, 1960

FILE COPY

Office Supreme Court, U.S.
FILED
OCT
JAMES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 425

UNITED SHOE MACHINERY CORPORATION,

Petitioner,

vs.

THE HANOVER SHOE, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JAMES V. HAYES
BURCK P. MCALLISTER
2 Wall Street
New York 5, N. Y.

RUSSELL J. O'MALLEY
Miller Building
Scranton, Pennsylvania

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. _____

UNITED SHOE MACHINERY CORPORATION,

Petitioner,

vs.

THE HANOVER SHOE, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

QUESTION PRESENTED

The sole question presented by the decision of the Court below is whether or not it was correct in holding, as a matter of law, that payment by plaintiff (Respondent) of excessive charges for shoe manufacturing machinery which it leased from defendant (Petitioner), the manufacturer and owner of such machinery, constituted injury to plaintiff "in his business or property" within the meaning of Section 4 of the Clayton Act, 15 U. S. C. A. Sec. 15, in the amount of such excess charges. The separate trial in the

District Court proceeded on the stipulated assumptions that (1) defendant's charges imposed upon plaintiff for use of shoe manufacturing machinery were excessive as alleged and (2) the said excess charges were the result of defendant's monopolization of the shoe manufacturing machinery market in violation of Section 2 of the Sherman Act.

"Questions Presented" as stated by defendant are argumentative in form and were necessarily disposed of by the decision of the Court of Appeals below.

STATEMENT OF THE CASE

The separate trial in the District Court was devoted almost entirely to the issue as to whether plaintiff passed on the excessive lease charges to the shoe buying public. The Court of Appeals affirmed the decision of the District Court which held that plaintiff's cause of action arose when it paid the excessive charges and, therefore, it was unnecessary to make findings of fact on the voluminous evidence on the passing-on issue (Petitioner's Appendix (hereinafter cited as App.) 193a). Plaintiff submits that this is correct and that there is no basis in the decisions below or indeed in the record for the statements of defendant in its petition that the monopolistic over-charges were "passed on by plaintiff to its customers" (Petition, p. 1) or that plaintiff "recovers them from his customers" (Question 2, Petition p. 2) or that they were "paid by plaintiff's customers" (Petition p. 4) or that plaintiff did not prove that it ultimately sustained damage when it paid the excess charges (Petition p. 5).

POINT I

The decision below is not in conflict with the decision of any other Court of Appeals on the same matter.

The District Court held that plaintiff had a cause of action "for the difference between what plaintiff was charged and what it could properly have been charged in the absence of monopolistic practices" (App. 193a-194a). The District Court further held that "This excessive price is the injury. The causal relation between defendant's wrong and plaintiff's harm is obvious" (App. 194a).

Defendant sought to avoid the force of this holding by urging upon the Court of Appeals the four well known oil jobber decisions (Petition pp. 7-9). It now contends that the rejection of these decisions has created a conflict between Courts of Appeals.

The four oil jobber decisions are plainly distinguishable. All four were an outgrowth of the convictions of various oil companies for having illegally fixed and raised tank wagon prices of gasoline, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940). The plaintiffs in each case were jobbers who bought gasoline at the tank wagon price from defendant oil companies for resale. Their treble damage actions were based on the increased cost to them of gasoline due to the illegally fixed and raised tank wagon prices.

The opinion of the District Court below distinguished all four decisions on the ground, urged by plaintiff, that "those cases involved middlemen who were selling a product supplied for resale by a Sherman Act violator whereas plaintiff here is simply a lessee of equipment which sells

its own product" (App. 197a). The Court also noted that in two of these cases, *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F. 2d 747 (8th Cir.), cert. denied 314 U. S. 644 (1941) and *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F. 2d 580 (8th Cir.), cert. denied 326 U. S. 734 (1945), the jobbers operated under margins which were guaranteed by contract with their suppliers so that "the original impact of the pecuniary loss never fell on the jobbers at all" (App. 197a).

Defendant seeks to find conflict with *Wolfe v. National Lead Co.*, 225 F. 2d 427 (9th Cir.) cert. denied 350 U. S. 915 (1955). It refers to what it describes as an alternative holding, but what the Court below properly describes as a dictum (App. 198a), as to passing-on by a paint manufacturer of an excessive charge for titanium pigment. Defendant does not mention in its petition the decision of the same Court of Appeals in the later case of *Flintkote Co. v. Lysfjord*, 246 F. 2d 368, cert. denied 355 U. S. 835 (1957). In that case, as the District Court below noted (App. 198a), the Court of Appeals relied on its earlier decision in the *Wolfe* case for other points but made no reference at all to the dictum in holding that damages were proven when plaintiff showed that he paid a higher price for his supplies as a result of the antitrust violations, 246 F. 2d at 389-90.

The dictum of the *Wolfe* case has been disapproved in the holding in the later *Flintkote* decision. Whatever conflict might have existed between a dictum in the 9th Circuit and the decision below has been resolved. The decision below is in accord with the *Flintkote* case in applying the correct rule of damage.

POINT II

The decision below is in conformity with decisions of this Court on the same matter.

The decision below, in accepting and applying the elementary rule of damages stated in Point I, above, is in conformity with long standing decisions of this Court and of lower federal courts in treble damage actions under the antitrust laws.

Chattanooga Foundry and Pipe Works v. *City of Atlanta*, 203 U. S. 390 (1906) - allowing recovery of the difference between the price paid for pipe and the price that the city would have had to pay had there been no illegal combination.

Thomsen v. *Cayser*, 243 U. S. 66 (1917) - allowing recovery of the difference between the excess freight rate fixed by a combination and paid by a shipper and a reasonable rate.

Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U. S. 555 (1931) - allowing recovery of the difference between amounts realized by plaintiff on sales and amounts that would have been realized except for the unlawful acts of defendants.

The principles stated in the foregoing leading cases have been applied in a large number of lower court cases. The following are a few of such decisions.

Straus v. *Victor Talking Machine Co.*, 297 Fed. 791, 799, 802-803 (2nd Cir., 1924);

Pfotzer v. *Aqua Systems*, 162 F. 2d 779 (2nd Cir. 1947);

Peto v. *Howell*, 101 F. 2d 353, 361 (7th Cir. 1939);

American Crystal Sugar Co. v. Mandeville Island Farms, 195 F. 2d 622, 625 (9th Cir. 1952), cert. denied 343 U. S. 957 (1952);

La Chapelle v. United Shoe Machinery Corp., 90 F. Supp. 721 (D. Mass. 1950);

Alden-Rochelle, Inc. v. American Society of Composers, Authors & Publishers (ASCAP), 80 F. Supp. 888, 898 (S. D. N. Y. 1948).

Contrary to the statements made in defendant's petition, pp. 14-15, the decision below is neither novel nor inconsistent with controlling decisions of this Court. It does not in any sense unsettle the law.

On the contrary, a decision in accordance with the theory urged by defendant, would leave the fruits of defendant's monopolization, the excessive charges, in the hands of the wrongdoer. These charges were paid out of pocket by plaintiff each year to defendant. The only way plaintiff could have been made whole would have been by a refund of the amount of the excess by defendant itself. That is what is sought in this claim for damages.

There is no windfall to plaintiff, as defendant urges. There is no injustice. The situation is the opposite. If defendant's defense of passing on is accepted, a fence will be built around defendant's wrongful gain from its monopolization of the shoe machinery trade. Plaintiff will have no redress. The precedent so created would leave without remedy future consumer victims of monopolistic producers. Such a result was rejected by the Court of Appeals. It would run directly counter to the Congressional policy stated in the treble damage provisions of the antitrust laws. If accepted, it would devitalize, if not nullify, the Congressional policy.

CONCLUSION

For all of the foregoing reasons, defendant's petition for writ of certiorari should be denied.

Respectfully submitted,

James V. Hayes
Breck P. McAllister
2 Wall Street
New York 5, N. Y.

Russell J. O'Malley
Miller Building
Scranton, Pennsylvania

ILE COPY

OFFICE OF THE CLERK, U.S.
FILED
DEC 5 1960
JAMES R. BROWNING, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 425

UNITED SHOE MACHINERY CORPORATION,
Petitioner

vs.

THE HANOVER SHOE, INC.,
Respondent

PETITION FOR RE-HEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RALPH M. CARSON
15 Broad Street
New York 5, N. Y.

LEWIS H. VAN DUSEN, JR.
1100 Philadelphia National
Bank Building
Philadelphia 7, Pa.
Attorneys for Petitioner

New York, December 5, 1960

INDEX

	PAGE
Opinions Below	1
Ground for Re-hearing	1
Argument: Respondent's Reliance on Three Principal Cases Is Unfounded and Has Misled the Court	2
Conclusion	7
Certificate under Rule 58	8

TABLE OF CASES

Chattanooga Foundry & Pipe Works v. City of Atlanta 203 US 390 ..... 2-4, 6-7

Flintkote Co. v. Lysfjord 246 F. 2d 368, cert. denied 355 US 835 2

Standard Oil Co. v. United States 221 US 1 4

Story Parchment Co. v. Paterson Parchment Paper Co. 282 US 555 ..... 2, 5-7

Thomsen v. Cayser 243 US 66 ..... 2, 4, 6-7

United States v. American Tobacco Co. 221 US 106 4

United States v. Tucker Truck Lines 344 US 33 6

Webster v. Fall 266 US 507 6

Wolfe v. National Lead Co. 225 F. 2d 427, cert. denied 350 US 915 ..... 2, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

UNITED SHOE MACHINERY CORPORATION, *Petitioner,*	
vs.	No. 423
THE HANOVER SHOE, INC., *Respondent.*	

PETITION FOR RE-HEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

United Shoe Machinery Corporation prays pursuant to Rule 58(2) for re hearing of the order herein November 21 1960 denying the petition for certiorari dated September 16 1960.

Opinions Below

The District Court's opinion dated February 12 1960 (App. 191a-202a) is reported in 187 F. Supp. 820. The Court of Appeals' opinion rendered June 30 1960 (petition pp. 24-6) is reported in 281 F. 2d 481.

Ground for Re-hearing

Refusal of certiorari in this case produces a contrariety of decision i the determination of liability under the Clayton Act as between the Third Circuit (the decision below) and the Seventh, Eighth and Ninth Circuits (cases cited in petition at pp. 7-10). We think such a result can be due only to inadvertence.

While respondent argued in opposition to certiorari here (br. 3-4) that the Seventh, Eighth and Ninth Circuits were "not in conflict" with the Third, the language and rationale of those cases shows clearly that they are.[1] In that situation we infer that certiorari was denied because the Court was misled into believing that prior cases in this Court had already decided in favor of respondent the question now tendered. These cases are *Chattanooga Foundry & Pipe Works v. City of Atlanta* 203 US 390 (1906), *Thomsen v. Cayser* 243 US 66 (1917), and *Story Parchment Co. v. Paterson Parchment Paper Co.* 282 US 555 (1931).

None of these cases had anything to do with the passing-on question presented by the decision here. They were argued *in extenso* upon the several applications for review (citations and asserted grounds at pp. 10-3 of petition), which this Court rejected, with respect to the decisions in the Seventh, Eighth and Ninth Circuits upon which we rely.

Argument: Respondent's Reliance On Three Principal Cases Is Unfounded and Has Misled the Court

1. In the *Chattanooga Foundry* case, this Court's opinion deals with the statute of limitations (stating, 203 US at 307-9, that the main question was which limitation was applicable under the laws of Tennessee) and also with the contention that plaintiff's business was not a part of interstate commerce. The Circuit Court's decision was a ruling on demurrer based on the statute of limitations (101 Fed. 900). The opinion of the Sixth Circuit Court

---

[1] The *Flintkote* case 246 F. 2d 368, cert. denied 355 US 835, also was erroneously relied upon by respondent (br. 4) as disapproving the proposition for which we cited *Wolfe v. National Lead Co.* 225 F. 2d 427, cert. denied 350 US 915. The opinion in *Flintkote* shows that the passing-on question was not even presented, much less determined.

of Appeals was also limited to these two points (127 Fed. 23).

The transcript of record filed February 23 1905 as No. 365 of this Court's October Term 1905 calendar contains nothing to sustain any contention that the passing-on defense was there involved. The motion by defendant Chattanooga for a new trial contained nine points, none of which has to do with the transfer of plaintiff's claimed damage to others (R. 46-50). Most of these assignments alleged error in connection with ascertainment of the market price of cast-iron pipe. The charge of the trial court to the jury (R. 73-81) will be searched in vain for any reference to the passing-on issue. The assignment of errors by defendant does not raise the point, although an objection does appear that plaintiff did not suffer "any damage in its business or property" by reason of the combination complained of (R. 85). This corresponds to the fifth paragraph of the demurrer filed August 16 1901 (R. 27). However, the record discloses no evidence on damage except a comparison from the exhibits of prices paid for pipe with fair market value (R. 41-2).

The brief of defendant in this Court relied principally upon the statute of limitations in the assignment of errors (p. 7) and discussed the Tennessee statute in detail at pp. 15 ff. Plaintiff City of Atlanta relied upon the statement of its case by Judge Lurton: 127 Fed. at 25-8, and then added (p. 7):

> "It would be a work of supererogation on our part to attempt to add to or strengthen the reasons advanced by Judge Lurton in sustaining the court below in its action in overruling the demurrer to plaintiff's declaration."

All this portion of the Sixth Circuit Court of Appeals' opinion dealt with the question of damages to the business of a municipal corporation without attention to any conceivable claim (evidently not made) that the alleged dam-

ages were passed on to and paid by others. From p. 28 of 127 Fed. Judge Lurton's opinion deals with the governing statute of limitations.

Defendant's sole reliance in the *Chattanooga Foundry* case was the intra-state character of plaintiff's business and the statute of limitations. The evidence did not present the passing-on issue; and the decision therefore is not an authority concerning it.

2. *Thomsen v. Cayser* involved an asserted foreign steamship combination which imposed upon plaintiffs excessive freight rates (243 U.S. at 70). Before coming to this Court the case had two trials. On the first it was dismissed on plaintiffs' evidence by reason of the court's conclusion that no cause of action had been established under the Sherman Act (149 Fed. 933). Plaintiffs obtained a reversal in the Circuit Court of Appeals in 1908 (160 Fed. 251). Upon the second trial plaintiffs obtained a jury verdict of $7,573.06 before trebling or the addition of an attorney's fee. This was reversed July 20 1911 by a majority in the Second Circuit Court of Appeals on the ground that the intervening *Standard Oil* and *Tobacco* cases, decided in May 1911, made the question of reasonableness of the restraint controlling and that the record did not enable the court to find that the acts of defendants amounted to a combination in unreasonable restraint of trade (190 Fed. 530).

The absence from *Thomsen v. Cayser* of any passing-on issue is clear from defendants' assignment of errors in the Second Circuit Court of Appeals following the second trial. This assignment, filed July 7 1909, is at R. 192-200 of the record in this Court, contains 32 items, and may be searched in vain for any reference to passing-on. Similarly the charge to the jury by Judge Hazel at R. 153-66 is devoid of any reference to plaintiffs' having transferred to others the 10% "primage exaction" which they claimed to be the

unreasonable rate imposed on them by the combination. The subject of damages which the jury might find is discussed more particularly at R. 100-2. The court pointed out that plaintiffs were entitled only to "actual damages in the nature of compensation", that the jury must determine whether the 10% primage was an excessive rate charged to prevent plaintiffs from patronizing other lines, and that in such event plaintiffs were entitled to recover back the primage just as if they had remained loyal shippers, the amount being shown beyond dispute as $5,000 (R. 101). The court also held that the jury might determine whether plaintiffs had been coerced into a loss of profit involving three items totalling $2,950 (R. 101). Finally the court said that the jury must determine whether plaintiffs had been coerced into a failure to ship by the Hansa Line at a saving of $6,700 (R. 102). The verdict was for $5,000 with interest (R. 107), viz. the exact amount of the 10% primage exaction.

Incidental reference was made by defendants in their brief in this Court (pp. 49-52) and in their supplemental brief on re-argument (pp. 22-3) that the facts "do not show injury to the plaintiffs". But no evidence was cited for any contention that the illegal exactions were passed on to third parties. The burden of the argument was that the evidence was equally consistent with a lawful exaction.

In this Court the argument and decision dealt with the reasonableness of the restraint, its effect on foreign commerce, and rulings as to damages. But none of these rulings involved any evidence that plaintiffs were made whole by their customers, as in the instant case.

3. *Story Parchment* dealt with a conspiracy between defendants and a third party to monopolize interstate commerce in vegetable parchment with the result of excluding plaintiff therefrom and destroying its business. This Court restated the jury's verdict for plaintiff in the sum of

$65,000, with discussion of the requirements of certainty in damages. The matter of plaintiff's passing on any loss could not have been presented, since the only questions submitted to the jury were loss of profits due to the forced closing of plaintiff's business (282 US at 561) and depreciation in value of its plant (p. 567). On the former point the complaint was, not that defendants over-charged plaintiff (as here), but that defendants instituted an unlawful regime of price-cutting (p. 561) which depressed plaintiff's sale prices "below the point of fair profit and finally below the cost of production" (p. 561).

4. Respondent here in opposing certiorari did not actually say that the foregoing cases disapproved the passing-on defense but only that the decision below "*is in conformity* with decisions of this Court on the same matter" (br. 5). But this is untrue. They are not "in conformity" because they did not involve the point here decided. Even if the possibility of plaintiff's having passed on the damage in those cases lurked somewhere in the record, the decision would not be a precedent for the case at bar. *United States v. Tucker Truck Lines* 344 US 33, 38 (1952); *Webster v. Fall* 266 US 507, 511 (1925), stating:

> "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. [Citations]"

5. At pp. 5-6 of the opposing brief six lower court cases are cited with the statement that they apply "the principles stated in the foregoing leading cases"; viz. *Chattanooga Foundry*, *Thomsen*, and *Story Parchment*. Without extending this petition, we represent to the Court that not one of these six additional cases considered or decided the passing-on issue tendered in the petition herein.

6. The *Chattanooga Foundry*, *Thomson* and *Story Parchment* cases, as well as all other cases within our knowledge which have been decided under the antitrust laws (except the case at bar), are consistent with a sound and reasonable construction of Section 4 of the Clayton Act whereby injury to "business" is limited to an impairment of the competitive position of the plaintiff and injury to "property" includes only such over-charges as have actually been absorbed by the plaintiff. Under such construction damages for injury to business in the monopoly cases would be recoverable only by the monopolist's competitors who were excluded from or driven out of business and damages for injury due to over-charges would be recoverable only by the consuming public where all purchasers from the monopolist paid the same over-charges and passed them on to the consuming public. *Wolfe* v. *National Lead Co.* 225 F. 2d 427 (CA 9 1955) and the four oil jobber cases cited in the petition for certiorari (pps. 7-10) demonstrate the soundness of such construction.

Conclusion

Not only the interest of justice but stability and certainty in the application of the antitrust law justify and require a resolution of the now existing conflict in the Circuits. Any impression which the Court may have received from the opposing brief that three leading cases here already considered the point, is shown to be unfounded and contrary to the fact not only by the opinions but by the briefs and records in this Court.

Hence the writ of certiorari should issue.

Respectfully submitted,

RALPH M. CARSON
LEWIS H. VAN DUSEN, JR.
Attorneys for Petitioner

New York, December 5 1960

$65,000, with discussion of the requirements of certainty in damages. The matter of plaintiff's passing on any loss could not have been presented, since the only questions submitted to the jury were loss of profits due to the forced closing of plaintiff's business (282 US at 561) and depreciation in value of its plant (p. 567). On the former point the complaint was, not that defendants over-charged plaintiff (as here), but that defendants instituted an unlawful regime of price-cutting (p. 561) which depressed plaintiff's sale prices "below the point of fair profit and finally below the cost of production" (p. 561).

4. Respondent here in opposing certiorari did not actually say that the foregoing cases disapproved the passing-on defense but only that the decision below "*is in conformity* with decisions of this Court on the same matter" (br. 5). But this is untrue. They are not "in conformity" because they did not involve the point here decided. Even if the possibility of plaintiff's having passed on the damage in those cases lurked somewhere in the record, the decision would not be a precedent for the case at bar. *United States* v. *Tucker Truck Lines* 344 US 33, 38 (1952); *Webster* v. *Fall* 266 US 507, 511 (1925), stating:

> "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. [Citations]"

5. At pp. 5-6 of the opposing brief six lower court cases are cited with the statement that they apply "the principles stated in the foregoing leading cases"; viz. *Chattanooga Foundry*, *Thomsen*, and *Story Parchment*. Without extending this petition, we represent to the Court that not one of these six additional cases considered or decided the passing-on issue tendered in the petition herein.

6. The *Chattanooga Foundry*, *Thomson* and *Story Parchment* cases, as well as all other cases within our knowledge which have been decided under the antitrust laws (except the case at bar), are consistent with a sound and reasonable construction of Section 4 of the Clayton Act whereby injury to "business" is limited to an impairment of the competitive position of the plaintiff and injury to "property" includes only such over-charges as have actually been absorbed by the plaintiff. Under such construction damages for injury to business in the monopoly cases would be recoverable only by the monopolist's competitors who were excluded from or driven out of business and damages for injury due to over-charges would be recoverable only by the consuming public where all purchasers from the monopolist paid the same over-charges and passed them on to the consuming public. *Wolfe* v. *National Lead Co.* 225 F. 2d 427 (CA 9 1955) and the four oil jobber cases cited in the petition for certiorari (pp. 7-10) demonstrate the soundness of such construction.

Conclusion

Not only the interest of justice but stability and certainty in the application of the antitrust law justify and require a resolution of the now existing conflict in the Circuits. Any impression which the Court may have received from the opposing brief that three leading cases here already considered the point, is shown to be unfounded and contrary to the fact not only by the opinions but by the briefs and records in this Court.

Hence the writ of certiorari should issue.

Respectfully submitted,

RALPH M. CARSON
LEWIS H. VAN DUSEN, JR.
Attorneys for Petitioner

New York, December 5 1960